No. 80-1082

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IN THE

Supreme Court of the United States

October Term, 1980

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Petitioner,

against

WILLIAM R. PHILLIPS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY AND SUPPLEMENTAL BRIEF FOR PETITIONER

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Respondent seeks to persuade this Court to deny certiorari by arguing that the decision below was a correct application of general principles to a unique set of facts which calls for an extraordinary remedy. The very arguments respondent makes to justify the decision below demonstrate why certiorari should be granted. Moreover, this Court's January 13th decision in *United States* v. *Morrison* (49 U.S.L.W. 4087) further demonstrates that the decision below was incorrect and an inappropriate intrusion into the state criminal justice process.

Respondent concedes that under the *Remmer* line of cases, a post-trial hearing is the appropriate procedural device to determine the truth of allegations concerning juror bias. He tries to justify the decision below, which ignored *Remmer,* by pointing out that the *Remmer* line of cases requires a hearing in situations involving outside influences on a juror while the influence here was conduct of the juror himself in applying for a job. Notably, the majority opinion never drew such a distinction, probably because impartiality is equally difficult to assess whether the alleged influence derives from outside sources or the juror's own conduct.

Respondent nevertheless proposes that the majority meant to say that the source of the bias renders *Remmer* inapplicable. To make that argument, respondent relies on Judge Oakes' comments at oral argument. An opinion can hardly be interpreted in light of comments at oral argument which did not find their way into the opinion. In any event, those comments do not support respondent's position. Judge Oakes did not state that the source of the alleged juror bias made it impossible at a post-verdict hearing to determine whether the juror was actually biased. Rather, the substance of Judge Oakes' comments is that a juror's assurance of his impartiality should not be accepted at face value. Here, the state trial judge did not accept the assurances at face value. Instead, as federal courts do, he found impartiality beyond a reasonable doubt on the substance of the juror's testimony, the demeanor and credibility of the juror and the testimony of other witnesses. *See Ristaino* v. *Ross,* 424 U.S. 589, 595 (1976); *see also United States* v. *Panebianco,* 543 F.2d 447, 457 (2d Cir.

1976), *cert. denied*, 429 U.S. 1103 (1977); *United States* v. *Hockridge*, 573 F.2d 752, 756 (2d Cir.), *cert. denied*, 439 U.S. 821 (1978).*

Given the fully supported finding of impartiality, undisputed by the courts below, respondent is clearly wrong in suggesting that the decision below turns on the unique fact that the juror applied for a job. It is plain, as seen by the majority's language quoted and emphasized by respondent on pages 7 and 8 of his brief, that the majority based its decision on the assistant district attorney's failure to disclose that application (*see* App. A to Petition at 10a). It seems fair to say that if the application had not been discovered by the trial prosecutors, until after the verdict, the majority would have held the *Remmer*-type hearing more than adequate. The hearing was ignored not because of any unique characteristic of the juror's conduct but because of the prosecutor's failure to disclose that conduct. As pointed out in pages 10-15 of the petition, whether reversal is the appropriate remedy for this breach of duty at the very least presents a substantial question.

Significantly, in regard to the question of remedy, on January 13, 1981, this Court decided *United States* v. *Morrison* (49 U.S.L.W. 4087) and held that an indictment should not be dismissed because of prosecutorial misconduct relating to the Sixth Amendment right to counsel unless there is a showing of prejudice. True, that case dealt with the dismissal of the indictment. The Court nonetheless emphasized that there was no prejudice and that

* The argument of respondent that the juror eagerly, quickly and without regard to the evidence voted to convict so that he could secure a job is not supported by the record and is contradictory to the trial judge's findings of fact which are fully supported by the record.

"the Sixth Amendment violation, if any, accordingly provides no justification for interfering with the criminal proceeding against respondent Morrison much less the drastic relief granted by the Court of Appeals" (*id.* at 4089). This language makes clear that, absent prejudice, a violation in a federal prosecution of even the Sixth Amendment's guarantee of the effective assistance of counsel provides no justification for a new trial. Surely, no different rule should apply in habeas corpus review of a state prosecution where a petitioner alleges a violation of the Sixth Amendment guarantee of the right to an impartial jury.

According to the *Morrison* case, a "[remedy] should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests" (*id.* at 4088). The appropriate remedy in a juror-bias setting has been tailored by the *Remmer* case. That relief is a post-verdict hearing with reversal only upon a finding of partiality. By their failure to follow *Remmer* the majority below has declared a new constitutional principle and has unnecessarily infringed on the interest of the federal-state comity. That the court below, in finding prejudice irrelevant, did enunciate a new principle in conflict with the *Morrison* case is confirmed by a brief examination of respondent's laundry list of the "multitude of appropriate and applicable legal theories that support the decision below." Brief in Opposition at 7.

The first and last of the inappropriate and inapplicable multitude pointed to by respondent is the implied bias doctrine also called the "objective-prophylactic rule." The court below expressly said that it was not basing its deci-

sion on this rule and indicated that it was not the law. App. A to Petition at 7a. In support of his implied bias argument, respondent mentions *Tumey* v. *Ohio*, 272 U.S. 510 (1927). Notably, *Tumey* involved the implied, perhaps even the actual, bias of a judge whose salary was in part paid by fees and costs imposed after conviction. *See also Connally* v. *Georgia*, 429 U.S. 245, 247-49 (1977). Here there is nothing in the record which supports a finding that the juror believed he would receive such a direct pecuniary benefit if he voted for conviction. Indeed, the state trial judge found that the juror had no such belief, a finding which is fully supported by the record and which was not disputed by either the district court or the court below.

Moreover, *Tumey* recognizes that it is important that a trial judge appear impartial because the alleged bias of a judge is not explored in detail by an impartial arbiter, but the judge himself decides whether or not he should preside. There is no such exploration because a hearing with cross-examination would be particularly unseemly, time consuming and a waste of resources. On the other hand, the impartiality of a juror is reviewable by a neutral judge, who can objectively hear testimony, observe demeanor, and weigh the evidence of a juror's partiality or impartiality. Accordingly, the Constitution requires the exclusion only of jurors who are actually, not impliedly or apparently, biased. *See United States* v. *Wood*, 299 U.S. 123, 140-46 (1936); *Frazier* v. *United States*, 335 U.S. 497 (1948); *see also Irvin* v. *Dowd*, 366 U.S. 717, 723 (1961); *Dennis* v. *United States*, 339 U.S. 162, 171-72 (1950); *Beck* v. *Washington*, 369 U.S. 541, 545 (1962).

Respondent's suggestion that the decision below could be supported by a rule of implied bias (even though the

majority expressly refused to so hold [App. A to Petition at 7a]) would make the decision conflict with not only the *Wood, Frazier, Irvin, Dennis* and *Beck* decisions, but also decisions of circuit courts, including the Second Circuit. *See, e.g., United States* v. *DeLeon,* 462 F.2d 170, 172 (5th Cir. 1972), *cert. denied,* 414 U.S. 853 (1973); *Mikus* v. *United States,* 433 F.2d 719, 724 (2d Cir. 1970). If this were the basis for the decision below, such a conflict alone would seem to call for a grant of certiorari.

To support the decision below, respondent also points to the due process disclosure requirement of the *Brady* and *Agurs* cases. However, those cases as demonstrated at page 12 of the petition require a showing of prejudice, a showing which cannot be made in this case. Respondent then turns to the "appearance of justice" language of *Rose* v. *Mitchell,* 443 U.S. 545, 555-56 (1979). However, that case specifically addresses the appearance of justice in the context of racial discrimination in grand jury selection and there is absolutely no racial issue in this case. Moreover, in a non-racial context, like this one, a rationale based upon the appearance of justice without a requirement of prejudice would be in direct conflict with the recently decided *Morrison* case.

In sum, there is no established legal theory which supports the court below, which has enunciated a new principle. Respondent seems to recognize that this is so for he continually suggests that the facts of the instant case are unique in the apparent hope that this Court will, as it generally does, refuse to grant certiorari to review such a case. But, this case does not turn on unique facts; it turns on a unique mistake of law with broad implications for future

cases. That mistake of law has led a bare two-to-one majority of a federal court to exercise in a state case a supervisory power uniquely belonging to the state courts, and which six state judges found injudicious to exercise. That mistake calls for review by this Court if we are to have a meaningful federal system.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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